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No. 82-934

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BASIC/FOUR CORPORATION,
Petitioner,

vs.

CENTRAL MICROFILM SERVICE CORP.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondent Central Microfilm Service Corp. ("CMS") prays that the Petition for writ of certiorari sought by petitioner Basic/Four Corporation ("B/4") to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this action September 24, 1982 be denied.

OPINIONS BELOW

The opinion of the Court of Appeals granting CMS's petition for writ of mandamus and directing the District Court to enter judgment in the full amount of the jury verdicts at the second trial is reported at 688 F.2d 1206 (8th Cir. 1982). It is included at pages 1-31a of the Appendix to B/4's petition. The opinion of the United States District Court denying B/4's post-trial motion

as to one claim (breach of contract) and ordering a remittitur or in the alternative a third trial as to the other claim (fraud) is not officially reported and is included at pages 33a to 56a of B/4's Appendix. The opinion of the United States District Court setting aside the verdict after the first trial and ordering a second trial is not officially reported and is set out in the Appendix hereto at pages A1-A3.

JURISDICTION

B/4 has correctly set out the jurisdictional facts and statute on which its petition for certiorari is based.

STATUTES INVOLVED

B/4 has correctly cited the statutes involved and set them out at pages 57a—58a of the Appendix to its Petition.

ISSUES PRESENTED FOR REVIEW

Whether the Court of Appeals correctly exercised its dicretionary power to review by writ of mandamus on one or more of the following grounds the order of the District Court which directed that plaintiff CMS agree to a remittitur of a sum certain or in the alternative required a third trial:

(a) The District Court's order is based on a finding of fact which is so blatantly wrong as to amount to a judicial usurpation of power;

(b) All issues but the erroneous remittitur order have been correctly resolved by two substantial verdicts for plaintiff for actual and punitive damages at two trials and by a lengthy post-trial District Court opinion after the second trial, and review by mandamus was necessary to avoid needless additional retrials which would only relitigate questions already decided.

(c) The District Court's order directing a remittitur of a sum certain or a third trial, rather than a reduced judgment which would permit an appeal, presents a question on which the Court of Appeals in the exercise of its supervisory appellate jurisdiction may properly provide guidance to the district courts.

STATEMENT OF THE CASE

At the first trial of this case, the jury returned verdicts in favor of plaintiff CMS totaling over $1,000,000. The District Court ordered a new trial. At the second trial, CMS obtained verdicts totaling $650,000. The District Court ordered a remittitur by a computed sum certain which would have reduced the judgment at the second trial to $406,478, or in the alternative required a third trial. CMS did not remit.

The remittitur order after the second trial holds as a matter of law that all CMS's computed software losses of $40,587 (plus five times this sum in punitive damages) are not recoverable because the District Court says that the Dealer Agreement between the parties does not require CMS to provide software services to customers and that B/4 did not request CMS to provide such software services. In fact, the written Dealer Agreement on its face plainly does require CMS to provide these software services and B/4 made written demands that CMS provide the software services. Thus there is no arguable rational basis for the District Court's finding of fact on which the order for a third trial squarely rests. It is the equivalent of saying that white is black when two juries have found that white is white. Moreover, the remittitur feature of the District Court's order serves no purpose but to prevent finality and appealability of the erroneous order and to require CMS to elect between foregoing its right of appeal and an expensive third trial.

The extraordinary circumstances under which the District Court entered this unusual order and the Court of Appeals exer-

cised its discretion to grant review by mandamus to avoid a third trial, and perhaps a fourth trial, are as follows:

1. Plaintiff Central Microfilm Service Corp., CMS, was a dealer purchasing and reselling B/4 computers in the St. Louis, Missouri area. CMS's Dealer Agreement is dated February 27, 1975. B/4 gave notice of termination of the Agreement in May, 1978, and immediately opened a company-owned branch sales office. CMS filed this suit June 1, 1978.

2. The first trial began April 30, 1979. It lasted nine trial days. Plaintiff CMS contended that B/4, by representation and conduct constituting estoppel and breach of contract (Count III) and fraud (Count V), induced CMS to expend the money necessary to introduce B/4's computer products into the St. Louis marketplace and then B/4 wrongfully terminated the dealership, opened a company-owned branch sales office, and appropriated CMS's investment in start-up costs. The evidence at the first trial went in smoothly until plaintiff called its chief accountant, Mr. George Springman, a certified public accountant who regularly does CMS's tax and audit work. Mr. Springman presented a calculation of cost over revenue, reflecting an investment by CMS of $260,900 over the entire period of the dealership (Exhibit 65A, Tr. I 361-2, 506) of which $73,050 was made after January 6, 1977, the date of the fraudulent representation (Exhibit 66A, Tr. 481, 747). The computed costs contained allocations based on calculated estimated apportionments of some overall CMS overhead costs (such as rent, telephone and management salary costs) to the operation of its computer division, St. Louis Information Systems ("SIS").[1] These allocations appeared to offend the District Court. The portions of the transcript at the first trial (Tr. I 360-372) and the second trial (Tr. II 759-769) included in the Appendix are but examples.

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[1] As the Court of Appeals observed, these allocations were properly for the jury. (Pet. App. 12a, 688 F.2d 1214)

(Appendix A4-A22)[2] Other examples are contained at Tr. I, 389-407, 412-420, 443-446, 526-534.[3] On May 9, 1979, the jury returned a verdict of $261,000 for breach of contract on Count III, $73,000 in actual damages on Count V for fraud committed January 6, 1977, and $750,000 in punitive damages on Count V. The damages for breach of contract and the actual damages for fraud were almost exactly the amount of Mr. Springman's calculations.

3. Sixteen months later, on September 23, 1980, the District Court ordered a new trial on both counts on the following grounds: (1) The verdicts on Counts III and V overlapped by $73,000; (2) The punitive damages award of $750,000 exceeded the amount of the prayer for relief; (3) There was "some doubt" as to whether the record provided a sufficient basis for any punitive damages, and therefore the $750,000 punitive damages award was disproportionate (C.R. 144-146, Appendix A1-A3)[4]

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[2] Tr. I ..." indicates a page reference to the transcript at the first trial, "Tr. II ..." a page reference to the transcript at the second trial, and "C.R. ..." a page reference to the Clerk's Record. "Pet ..." indicates a page reference to Basic Four's Petition For Writ of Certiorari, "Pet. App ...", a page reference to the Appendix to Basic Four's Petition and "Appendix ...", a page reference to the Appendix to this Respondent's Brief in Opposition to B/4's Petition.

[3] A witness, especially one with Mr. Springman's credentials, is entitled to be listened to instead of constantly interrupted and criticized without reason as he was here. The District Court's comments are reminiscent of other occasions on which the Eighth Circuit has criticized his coments as "better left unsaid." *Adams Dairy Company* v. *St. Louis Dairy Company,* 260 F.2d 46, 56 (8th Cir. 1958) and as having along with needless objections of counsel "abused . . . the orderly progress of the trial." *Hoppe* v. *Midwest Conveyer Company, Inc.,* 485 F.2d 1196, 1202 (8th Cir. 1973).

[4] Additionally, the District Court observed that his conclusions were "illustrated" by the fact that the jury returned a verdict in twenty minutes Appendix A-3. This is error. The fact that a jury's deliberation is brief has no effect on the validity of the verdict. See 91 ALR2d 1220-1232, and see in particular *Segars* v. *Atlantic Coast Line Railroad Company,* 286 F.2d 767 (4th Cir. 1961).

The first new trial order is significant here for serveral reasons: (1) It required the burden and expense of a second trial for reasons at least some of which are tenuous;[5] (2) It delayed the final disposition of the case sixteen months; (3) Although the evidence at the first trial was the same as at the second, there is no mention in the first new trial order of software losses or any allusion to the ground on which the remittitur or new trial was ordered after the second trial; (4) There is no mention of Mr. Springman or his testimony.

4. CMS's counsel attempted at the second trial to remove each of the District Court's objections to the first judgment expressed in the new trial order of September 23, 1980: (1) CMS requested and the District Court gave in different form an instruction at the second trial directing that in the event the jury found for plaintiff on both counts, it was to deduct from the verdict on Count III any amount awarded as actual damages for fraud on Count V. This eliminated any issue of duplication of damages; (2) CMS raised its prayer to $2,000,000. This eliminated any issue of a punitive damages award which would

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[5] The Court of Appeals was unwilling to say that the first new trial order was an abuse of discretion. It held that while the District Court might well have entered a judgment in the sum of the verdicts on the two counts less $73,000 as suggested by CMS, it was not an abuse of the discretion vested in the District Court to order a new trial based on the overlap when there was some possibility of jury confusion on punitive damages. (Pet. App. 11a, 688 F.2d 1213). The Court of Appeals held the second ground for a new trial erroneous. (Pet. App. 11a, 688 F.2d 1213) The Court of Appeals did not rule on plaintiff's contention that the third ground erroneously equated this case to an earlier doubtful case for punitive damages. (Pet. App. 11a, 688 F.2d 1213) With respect to the third ground, it is just plain difficult to understand the District Court's view that this case presented a doubtful case of punitive damages when the jury could reasonably have found and did find that a large business deliberately defrauded a small dealer into spending the necessary money to introduce the Company's product into the marketplace and then terminated the dealer when the large start-up costs had been spent and profits were near.

exceed the prayer; (3) CMS's counsel asked the jury for punitive damages five to eight times the actual damages of $78,000 for fraud shown at the second trial. This was in effect an invitation to the jury to bring in a verdict for five times the actual damages or $390,000, which was exactly the punitive damages award at the second trial.

5. On April 23, 1981, after a twelve-day second trial, the jury returned a verdict of $182,000 on Count III and $78,000 in actual damages and $390,000 in punitive damages on Count V. The evidence was essentially the same as at the first trial. The District Court stated during the second trial that a "main reason" for granting a new trial after the first trial was that he never should have let Mr. Springman testify, because Mr. Springman was not listed in answer to interrogatories as an expert at the first trial (Appendix A-18, Tr. II, 762).[6] As indicated this ground was not mentioned in the first new trial order.[7] The District Court remarked at the second trial, "You listed him as an expert this time and in my opinion, it's a $64.00 question whether or not he is an expert." (Appendix A-22, Tr. II, 768-769). The jury verdicts at the second trial were again almost exactly in accord with Mr. Springman's calculations. (Exhibit 225a2, 66C2, Tr. II, 776, 813-815).

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[6] Plaintiff's counsel believed it inappropriate and unnecessary to attempt to surround Mr. Springman with the status of an expert, especially in view of the relatively simple calculations which he presented based upon accounts and facts of which he had a long time working knowledge. Basic/Four fully explored Mr. Springman's calculations and their bases in deposition (Tr. I 558-60, 963-4). But the District Court had serious difficulty with the fact that Mr. Springman was not named as an expert at the first trial. Hence, plaintiff did name him as an expert at the second trial.

[7] Basic/Four has previously argued and presumably will argue again that it was unnecessary for the District Court to state this reason in his first new trial order. But it is at least unusual for a District Court to sustain a motion for new trial by written order and to omit a "main

6. On July 2, 1982, the District Court held CMS was correct on every issue raised in B/4's post trial motions concerning submissibility of the case, evidence and instructions (Pet. App. 33a-56a) (C.R. 198-220). But with respect to damages for software services losses on the fraud count, he held:

> "With respect to software service costs the Court finds that the jury unjustly compensated plaintiff in Count V. The credible evidence showed that from January 7, 1977, through March 31, 1979, plaintiff had sales of $170,322.00 against expenses of $210,909.00 for a loss of $40,587.00. See Exhibit 66C-2. The credible evidence showed further that in spite of a competitive software services market and a crying need to bolster sales plaintiff invested substantial time and effort in software services. *This was required neither by the Agreement nor at the request of defendant.* Accordingly, the Court finds that the jury award in Count V improperly included $40,587.00 in losses for computer software services." (Pet. App. 52a) (Emphasis supplied.)

The District Court held that since the punitive damages award was five times the actual damages, only five times the $37,413 in remaining actual damages, or $187,065 would be allowed as punitive damages (Pet. App. 56a). Accordingly, he ordered a remittitur to these amounts on Count V so as to reduce the judgment to $406,478 or in the alternative a third trial on Count V (Pet. App. 56a).

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reason" for the new trial, especially when that "main reason" is of extremely doubtful validity. Mr. Springman was the company's regular certified public accountant. Basic/Four was fully apprised of his calculations, having deposed him twice. And he was listed in answer to interrogatories as a fact witness at the first trial (Tr. I, 536-7, 558-60, 961-64). Under these circumstances, it was certainly not error to permit him to testify, and in any event having permitted him to testify, there was no appropriate basis for awarding a new trial. *Phil Crowley Steel Corp.* v. *Macomber, Inc.*, 601 F.2d 342 (8th Cir. 1979).

The District Court based Its conclusions on two findings of fact: (1) that Central Microfilm was not required to supply software services to Basic/Four computer customers under the Dealer Agreement; (2) that B/4 did not request CMS to supply software services. These findings of fact are directly contrary to the express terms of the Dealer Agreement, to several of B/4's written demands to CMS, and to substantial testimony.

It is basic that a working computer installation requires hardware and software. B/4 sells hardware and software. Paragraph 13 of the Dealer Agreement covers the software aspects of the dealership (Exhibit 3, Appendix A23-A26, Tr. II 44-47, 1005). Paragraph 13-A of the Dealer Agreement provides:

> "13. **Software**
>
> "A. The Dealer shall be responsible for providing adequate software programming to meet the requirements of purchasers of Systems from it. Such programming services shall also meet reasonable standards established from time to time by the Seller." (Appendix A24)

Paragraph 13-I of the Dealer Agreement provides:

> "I. The Preplanned Applications or User Software are furnished to the Dealer as a convenience and aid to the Dealer and the furnishing of the Preplanned Applications or User Software shall in no way relieve the Dealer of the responsibility to provide adequate software programming services for purchasers of Systems from it, as provided in subparagraph A." (Appendix A26)

Exhibit 163 (Appendix A27-A30, Tr. II, 270-273), a summary of B/4's dealership program furnished by B/4 to CMS's General Manager for Computer Operations, Michael Frankwicz, prior to the dealership agreement, provides in pertinent part:

"**Software**

The dealer will provide by whatever means he feels necessary all required application software contracted between the dealer and the dealer's customer for the satisfactory performance of the system. Applications software can be a source of additional revenue for the dealer. (Appendix A29)

In Exhibit 8, (Appendix A31-A32, Tr. II, 64), a letter from CMS to B/4 dated November 25, 1975, B/4 demanded:

"3. Systems installation and programming manpower for the approximate eleven systems which you need to sell in the next six months is estimated at two men, if these are CBS [Basic/Four application software package] installations. Obviously, if these are to be custom installations your requirements will double. It will be necessary for you to hire one additional systems man immediately, and make plans for the second person in concert with your sales achievement. Success beyond the minimum established goal will require additional staffing, and we advocate that you begin to develop outside software vendor master agreements to provide an alternative to increased staffing." (Appendix A32)

In Exhibit 15-A (Appendix A34-A37, Tr. II, 58), a letter agreement amending the Dealer Agreement dated May 25, 1976, B/4 demanded:

"F. **Software**

As orders are booked by St. Louis Information Systems [CMS computer division], evidence must be given to Basic/Four Corporation of the ability to install successfully in a timely basis through either additional in-house staffing or contracts with outside firms." (Appendix A36)

CMS's General Manager of its computer operation, Mr. Frankwicz, testified that CMS used in-house computer programmers at the beginning and began to use independent software vendors "as activity picked up" (Tr. II, 292). Activity "picked up" when CMS began to sell computers early in 1977 at the rate of one a month (Tr. II, 71, 296). Exhibits 65-C2 and 66-C2 (Tr. II, 776, 812-815) disclose that software expenditures began in earnest not earlier than April 1 of 1977. This record discloses that plaintiff used in-house programmers to install software at the beginning, just as B/4 suggested that they be used in Exhibit 8, and began to use independent software vendors at a point where B/4 suggested they be used, i.e., when volume began to increase. The various independent software vendors utilized by plaintiff demanded time and material payments on their first jobs (Tr. II, 292-293, 435). Software vendors trained on B/4 equipment cost time and money to develop and are considered by B/4 a valuable asset (Tr. II, 985-986). After termination of CMS, the software vendors trained at CMS's expense were available to B/4 branch and were used by the B/4 branch (Tr. II, 1348-1349).[4]

7. The District Court's order of a remittitur or a third trial on Count V rests entirely upon his factual conclusion that plaintiff's "investment of substantial time and effort in supplying software services . . . .was neither required by the [Dealer]

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[4] The Court of Appeals observed that the record includes correspondence showing that B/4 initially recommended in-house programmers and later greater reliance and on independent vendors and further that the dealership agreement, the summary of the dealership program which B/4 distributed prior to reaching the agreement and the course of dealing between these parties "leave no doubt" that CMS had the duty "to obtain and provide software services which would adopt the basic systems to the particular needs of customers." Pet. App. 12a-13a, 688 F.2d 1214. The portions of Exhibits 3, 163, 8 and 15 A and the testimony which CMS has here quoted and described admit no other interpretation.

Agreement nor at the request of the defendant." Essentially the District Court found that the Dealer Agreement (Exhibit 3) and Exhibits 8, 15 A and 163 do not provide what plainly they do provide. He held that the jury could not reasonably have found that the documents say what on their faces plainly they do say. His holding is, as previously stated, the equivalent of saying that white is black.[9]

8. The portion of the order of July 2, 1981 granting a remittitur or in the alternative a third trial on Count V serves no purpose but to prevent an appeal. Under *Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648, 97 S.Ct. 835, 51 L.Ed.2d 112 (1977), agreement by plaintiff to the remittitur order would have barred plaintiff from appealing the erroneous reduction of the judgment. Plaintiff's alternative was a third expensive trial in order to exercise its right of appeal. The District Court found the judgment too high by a sum certain. It could have reduced

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[9] B/4 argued in the Court of Appeals that this portion of the District Court's order was a determination that CMS was grossly inefficient in handling software services. The Court of Appeals correctly held: (1) That is not what the order says. It says that software losses may not be recovered because CMS's investment in software services was not required by the Dealer Agreement or requested by the defendant, and (2) The issue of CMS's alleged inefficiency in handling software services which B/4 erroneously attempted to raise was in any event for the jury (Pet. App. 13a-14a, 688 F.2d 1214-1215). B/4 attempts at pages 8 and 9 of its Petition to sidestep this point by contending that the language of the District Court's order recites some undefined insufficiency of the evidence to support the software losses as damages. But the language of the District Court's order is clear. The District Court squarely held that $40,587 in actual damages for software losses and five times that amount of punitive damages were not recoverable because CMS's investment in software services was not required by the Dealer Agreement or requested by the defendant. As the Court of Appeals held, this conclusion is plainly wrong. No amount of argument will change the language of the District Court's order or by forced construction alter its meaning.

the judgment and thus permitted both sides to appeal. *Staplin* v. *Maritime Overseas Corp.*, 519 F.2d 969 (2nd Cir. 1975); *Garfield Aniline Works* v. *Zendle*, 43 F.2d 537, 538 (3rd Cir. 1930). Plaintiff pointed out in a motion for rehearing filed July 7, 1981 the plainly erroneous factual basis for the remittitur order, the unfair dilemma in which it placed plaintiff, and the fact that if the District Court had chosen to do so, it could have reduced the judgment permitting both sides to appeal. (C.R. 221-223 and Exhibit C to the Record on Appeal, p. 6) Reconsideration was denied (C.R. 225-226).

9. CMS has expended over $200,000 in pressing what counsel believes to be a meritorious case of malicious fraud. Two juries have so found. Try as one will, it is impossible on this record to find any kind of rational basis for saying that the Dealer Agreement (Exhibit 3) and Exhibits 8, 15 and 163 do not require and request CMS to invest money and effort in supplying software services. Try as one will, it is impossible on this record to find any kind of rational basis for the District Court to order a remittitur or in the alternative a new trial instead of a reduction of the judgment on Count V after the second trial.[10]

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[10] The usual purpose for an order directing a remittitur or in the alternative a new trial is not present here. Remittitur is usually used in cases such as personal injury damage suits where the court concludes that a verdict is excessive but there is not an acceptable sum certain shown by the evidence to which the judgment may be reduced. In such cases the court, based on its view of all the evidence, in its discretion arrives at a figure deemed to be the maximum which a jury might reasonably have allowed and orders a remittitur or in the alternative a new trial, because it cannot quantify the precise amount by which the verdict is excessive. Where, as in the instant case, the district court concludes the verdict was too high by a computed sum certain, remittitur as distinguished from reduction of the judgment by the sum certain serves no purpose. If it is argued that a third trial would permit more proof that software services were required or requested, how much more proof could plaintiff offer?

It is under these rare circumstances that the Court of Appeals, after review based on over 2500 pages of testimony at 21 days of proceedings at two trials, in its discretion decided to review the second new trial order by writ of mandamus.

REASONS FOR DENYING THE WRIT

B/4's petition for writ of certiorari should be denied, because the Court of Appeals issued the writ of mandamus under settled principles of law. Mandamus is concededly appropriate only in the rare and extraordinary circumstances outlined by the cases. The Court of Appeals applied the existing case law to find them here. There is no occasion for this Court to define further the rare and extraordinary circumstances which will warrant the discretionary issuance of the writ of mandamus.

I

The Court Of Appeals Correctly Exercised Its Discretion To Review By Mandamus The District Court's Order Of A Remittitur Or In The Alternative A Third Trial, Because The District Court's Order Is So Blatantly Wrong As To Amount To A Judicial Usurpation Of Power.

Mandamus is available for interlocutory review "under exceptional circumstances amounting to judicial usurpation of power." *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 66 L.Ed.2d 193, 101 S.Ct. 188 (1980). The cases have recognized that it is possible for a decision of law or fact by a district court in granting a new trial to be so wrong as to amount to a judicial usurpation of power and thus warrant a court of appeals' grant review by mandamus. Rare though the cases are, the courts have recognized that a district court does not have discretion to order needless retrial on the ground that white is black.

In *Grace Lines, Inc.* v. *Motley*, 439 F.2d 1028 (2nd Cir. 1971) one juror remarked during the polling of the jury following a verdict for the defendant that she voted for the verdict in order to make the verdict unanimous. The district court, on its own motion, ordered a new trial and set the retrial three days later. The remarks of the juror were brief and plain. The law was clear that they did not amount to a sufficient basis for a retrial. The

Second Circuit by mandamus ordered the new trial order set aside and judgment entered on the verdict for the defendant. One judge observed that "mandamus will lie in the sound discretion of the Appellate Court where the trial court has committed a clear abuse of discretion" and held that the district court abused its discretion in ordering a new trial. Another judge observed that mandamus was required to "correct an egregious error of the District Court in setting aside the verdict of the jury and in scheduling a needless retrial." The *Motley* case turns ultimately on the fact that the juror's remarks were brief and plain and the law completely clear that they did not amount to a sufficient basis for a retrial.

In *General Motors Corporation* v. *Lord,* 488 F.2d 1096 (8th Cir. 1973), the Eighth Circuit distinguished *Motley* on the ground that the district court's ruling on an evidentiary issue in sustaining a motion for new trial was not so "blatantly wrong" as to justify the issuance of mandamus.

In *In re United States,* 565 F.2d 173, (1st Cir. 1977) the First Circuit set aside a new trial order by mandamus in a criminal case and ordered the judgment of conviction reinstated. The Court balanced the various considerations appropriate to a decision to grant or deny a writ of mandamus and relied heavily on the conclusion that the district court ignored completely the rules contained in the Federal Rules of Criminal Procedure which govern the granting or denying of a motion for new trial on the ground of newly discovered evidence.

These cases recognize the necessary corollary to the rule that mandamus will issue only under exceptional circumstances amounting to judicial usurpation of power. The exercise of reasoned factual judgment and reasoned selection and application of controlling principles of law is basic to the judicial process. While it is true, as Basic/Four suggests, that mandamus does not "run the gauntlet of reversible errors" (Pet. 7), it is also true that there is a point beyond which a needless retrial

may not be based on a *non sequitur*. When a decision is so "blatantly wrong" as to be the equivalent of saying that white is black or a spade is a club, judicial power has been usurped and even the broad discretion vested in the district court on a motion for new trial is exceeded.

This is such a case. The Court of Appeals correctly held review by mandamus is available here because the right to the writ is "clear and indisputable" and the District Court's decision was "blatantly wrong" (Pet. App. 7a, 688 F.2d 1212). As the Court of Appeals quite correctly decided, the District Court's second new trial order was based entirely on his conclusion that software services were "required neither by the [Dealer] Agreement nor at the request of the defendant." There is no rational basis of any kind for saying that the two pages of Paragraph 13 of the Dealer Agreement, particularly Paragraphs 13A and I, do not require CMS to provide software services. There is no rational basis of any kind for saying that Exhibits 163, 8 and 15A do not request that CMS provide software services to its customers by whatever means it deems appropriate. The documents are brief and plain, and their meaning clear. A district judge simply does not have jurisdiction to hold that a jury may not reasonably find that a document says what it says. He may not be this blatantly wrong in ordering a needless retrial. Hence, review by mandamus was appropriate.

II

The Court Of Appeals Correctly Exercised Its Discretion To Grant Review By Mandamus Of The District Court's Order For A Remittitur Or In The Alternative A Third Trial, Because It Appears That The Parties And The District Court Were Embarked Upon A Course Which Would Otherwise Lead To Successive Needless Retrials.

The Eighth Circuit based review herein by mandamus in part upon the following:

> Twice the plaintiff has prevailed on its contract and fraud claims, obtaining substantial awards of actual and punitive damages. The only outstanding issues are CMS's contention that it software losses were properly recoverable and Basic/Four's claims that it was entitled to j.n.o.v. as a matter of law, that the punitive damage award was excessive and that the jury was given erroneous instructions. Each of these issues has been squarely decided by the district court or the jury. Appellate review is thus "fundamental to further conduct of the case."[11] Absent review, a third trial would present the type of needless relitigation which is antithetical to the final judgment rule. Moreover, in a light of the district court's post-trial rulings, a third trial would be conducted with virtually the same instructions and evidence as at the second trial, so if the parties' assertions of error are valid, a fourth trial could well be necessary. (Pet. App. 9a-10a, 688 F.2d 1213)

Thus the Court of Appeals correctly observed that the parties and the District Court appeared to be embarked upon a course which would relitigate unnecessarily one or more times precisely the positions litigated at the first two trials with the same results.

B/4 argues at pages 9 and 10 of its Petition that it is irrelevant that the District Court's order followed a second trial, citing a number of cases involving two or more trials where mandamus was denied. But B/4 cites no case in which a plaintiff has twice

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[11] The phrase "fundamental to the further conduct of the case" is taken directly from this Court's opinion in *Gillespie* v. *United States Steel Corporation* 379 U.S. 148, 152-154, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) in which a marginally final order is held reviewable on direct appeal where "fundamental to the further conduct of the case" i.e. where appeal is appropriate to permit the case to get on to a conclusion. Compare *Haberern* v. *Lehigh & N. E. Ry. Co.*, 554 F.2d. 581 (3rd Cir. 1977) where a stay order which had the practical effect of suspending plaintiff's claims indefinitely was held final and appealable.

won large jury verdicts and faces a third trial because of a blatantly erroneous finding of fact that a judgment is to high by a sum certain coupled with a remittitur or new trial order that serves no purpose but to prevent finality and appealability. The fact that there is the prospect of a third trial in the instant case is an important aspect of the extraordinary circumstances which warrant mandamus here, because it presents directly the prospect of repeated needless retrials.

It is impossible to review the record of these two trials and not conclude that there is a real risk that if plaintiff CMS should be required to try its case on Count V again and receive another large verdict, there would be an order for still another needless retrial.

Whatever may be the merit of the first new trial order, it is clear that the second is completely baseless. It rests upon findings of fact which are so wrong as to defy reasoned analysis. And considerations of judicial economy and conservation of the parties' resources would seem to compel ordering a reduction of the judgment rather than a remittitur or in the alternative a third trial. Such an order would permit the Court of Appeals to affirm the reduction if correct and reverse it if wrong. The only function served by the remittitur feature of the District Court's order of July 2, 1981 is to require CMS either to agree to a patently erroneous reduction of its second judgment and thus forego the right to appeal the reduction, or to bear the burden and expense of a needless third trial as the price of a final appealable order. The fact that the District Court has entered so baseless an order after two substantial plaintiff's verdicts is reason to apprehend that a large plaintiffs verdict on Count V after a third trial would produce still another equally baseless new trial order.

Moreover, the District Court stated at the second trial that Mr. Springman's testimony was a main reason for the first new trial order although that point is not mentioned in the order

itself. The reason given for the second new trial order, the claimed failure of the Dealer Agreement to require or the defendant to request that CMS supply software services, was not mentioned in the first new trial order. CMS could not anticipate or guard against any risk that the District Court would make such a ruling after the second trial. Although Mr. Springman's damages calculations, including allocations of overhead, involve only the most elementary principles of cost consideration and two juries have now accepted them almost to the dollar, the District Court's unexplainable antagonism toward plaintiff's attempt to recover its allocated overhead expenses cannot be ignored. The District Court's attitude and willingness to grant a new trial for a main reason not contained in his first new trial order, together with his willingness to enter a baseless new trial order after the second trial, gives rise to the inference that if plaintiff should be required to try and win its case again, there would be still another new trial order, especially if another jury should accept Mr. Springman's calculations.

B/4 places it principal reliance on *Allied Chemical Corporation* v. *Daiflon, Inc.*, 449 U.S. 33, 66 L.Ed.2d 193, 101 S.Ct. 188 (1980). In *Daiflon,* the district court set aside a large plaintiff's verdict in an antitrust case and granted a new trial. The Tenth Circuit granted review by mandamus, directing that a portion of the district court order granting a new trial be set aside. It based its conclusion on the arbitrary and erroneous nature of the district court's conduct and decision (612 F.2d 1249). This Court reversed in a *per curiam* opinion in which five members of the Court concurred, characterizing the availability of mandamus by reference to the refrain, "What never? Well, *hardly* ever." (449 U.S. 36). Two members of the Court did not participate. Two voted to pursue the matter further.

But *Daiflon* involved one new trial order, not two. Suppose the *Daiflon* case were retried and plaintiff again prevailed. And suppose the district court awarded defendant a third trial on

plainly erroneous grounds or wrote a remittitur order directing on plainly erroneous grounds that plaintiff remit a large sum certain out of a second plaintiff's verdict or submit to a third trial. At some point the kind of circumstances involved in *Daiflon* and involved in the instant case must warrant the intervention of the Court of Appeals by mandamus, especially when the second new trial order turns on a conclusion as erroneous as the one here and serves no purpose but to prevent an appeal.

The "All Writs" statute provides that the courts of appeal have jurisdiction to issue all "writs necessary . . . . .in aid of their respective jurisdictions. . .," 28 U.S.C. 1651. This Court has stated in *Roche* v. *Evaporated Milk Association,* 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943) that this authority

> ". . . is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal." (319 U.S. 25)

The two trials herein have consumed 21 days of trial proceedings and over 2500 pages of trial transcript. Defendant has discovered and rediscovered every conceivable aspect of the case. Thus, for example, the defendant took the deposition of Michael Frankwicz, CMS's general manager, for over ten full days. And there have been other lengthy depositions of plaintiff's personnel and other personnel. This is not a big enough case to stand the kind of cost burden which successive retrials are imposing. There is a real risk that the burden of successive retrials will deprive CMS of its right to conclude this case in the District Court and to present its position in the Court of Appeals. Hence review by mandamus was appropriate.

III

The Court Of Appeals Correctly Exercised Its Discretion To Review By Mandamus The District Court's Order Of A Remittitur Of A Sum Certain Or A Third Trial, Because The Order Presents An Important Question On Which Guidance Of The District Courts Is Appropriate.

Extraordinary circumstances where the order under attack is characteristic of a practice likely to reoccur or exemplifies a novel and important question in need of resolution for future cases will warrant review by mandamus. *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 258, 77 S.Ct. 309, 1 L.Ed.2d 290 (1957); *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111-112, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964); *General Motors Corporation* v. *Lord*, 488 F.2d 1096, 1099 (8th Cir. 1973).

As shown in the previous section there is a likelihood of recurrence in this case.

Rule 61, Federal Rules of Civil Procedure, bespeaks a policy against needless retrials. Such a policy is just as important as the final order rule to the conservation of the resources and energies of bench, bar and litigants. The policy considerations which underlie the final order rule and the policy considerations against needless retrial should be balanced one against the other. Opportunities for pronouncing guidelines for district judges in this important context are rare. They are normally confined to such cases as *Fireman's Fund Insurance Co.* v. *Aalco Wrecking Co., Inc.* 466 F.2d 179 (8th Cir. 1972) and *Reed Brothers, Inc.* v. *Monsanto Company*, 525 F.2d 486 (8th Cir. 1975) in which an order granting a motion for new trial is coupled with an ~~order denying a motion for new trial is coupled with an~~ order denying a motion for judgment n.o.v. and reviewable as such under Rule 50(c)(1), or to situations where the Court of Appeals must speak, as it did in *General Motors Corporation* v. *Lord*, 488 F.2d 1096 (8th Cir. 1973) by way of dicta accompanying

denial of review by mandamus. As the necessarily few opinions on the subject indicate, district judges do grant new trials for reasons which do not warrant them.

The Court of Appeals based its discretionary assertion of jurisdiction by way of mandamus here in part on the following:

> "An important issue is also presented on which guidance for future cases is appropriate: whether generally a new trial rather than a reduced judgment should be ordered when the only alleged defect involves a discrete question of law and fact relating to a sum certain in damages." (Pet. App. 10a, 688 F.2d 1213)

The Court went on to present the guidelines by pointing out that when the only defect in a judgment is that it is too high by a sum certain, reduction of the judgment rather than a new trial is appropriate. (Pet. App. 15a, 688 F.2d 1215)

The case falls squarely within the principles announced in *LaBuy* and *Schlagenhauf* which authorize the courts of appeal in their discretion to assert supervisory jurisdiction by way of mandamus over the district courts review an error likely to reoccur or to provide guidance to the district courts for the resolution of novel and important questions. (See 9 Moore's Federal Practice ¶110.26, p. 287, ¶110.28 p. 312)

This is an especially suitable case for the exercise of supervisory appellate jurisdiction by way of mandamus. The extraordinary circumstances of the case include two successive large plaintiffs verdicts, a conclusion by the District Court that judgment should be reduced which is predicated on a blatantly wrong finding of fact, and a remittitur requiring that judgment be reduced by a sum certain or in the alternative ordering needless third trial. The circumstances are so extreme that there is no risk the grant of mandamus here will erode the final order rule.

CONCLUSION

In *Allied Chemical Corp.* v. *Daiflon Inc.*, 449 U.S. 33, 66 L.Ed.2d 193, 101 S.Ct. 188 (1980). This Court characterized the availability of mandamus with the refrain "What, never? Well *hardly* ever." (449 U.S. 36). The phrase "*hardly* ever" necessarily means that there may be rare occasions on which the writ is available to review a district court's new trial order if the required extraordinary circumstances are found to exist.

The Court of Appeals correctly found three separate bases for the exercise of its discretion to grant the writ of mandamus here. Each is soundly based on cases already decided. There is no more to be said about the extraordinary circumstances which will warrant review by mandamus than has already been said in the decided cases. When the exceptional case which warrants mandamus is presented, it is clearly recognizable. This is such a case.

The efficient administration of justice and the proper balance between the final order rule and the policy against needless retrials will be best served if the opinion of the Court of Appeals is permitted to stand as the rare example of the extraordinary circumstances which warrant review by mandamus of a new trial order.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix:

Appendix A - Memorandum and Order, of the United States District Court, Eastern District of Missouri, Eastern Division A-1

Appendix B - Excerpts of Testimony of Plaintiff's Certified Public Accountant, George Springman, at the First Trial A-4

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Appendix E - Plaintiff's Exhibit 163 — The Basic/Four Corporation Dealership Program A-27

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APPENDIX A

The First New Trial Order Of September 23, 1980

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 78-550C (A)

Central Microfilm Service Corporation,
a Missouri corporation,
Plaintiff,

vs.

Basic/Four Corporation, a Delaware corporation,
Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on defendant's motion for a judgment notwithstanding the verdict or in the alternative for a new trial.

The motion contains twenty-five grounds and the briefs on behalf of both parties are very lengthy. There is no occasion for the Court to deal with each of the grounds set forth in the motion. The jury verdict for the plaintiff was for the sum of $261,000.00 on Count III, $73,000.00 in actual damages on Count V, and $750,000.00 in punitive damages on Count V, the only two counts submitted to the jury.

The damage instructions on Counts III and V overlap as to damages that are recoverable (other than punitive), in that the actual damages covered by the instruction on Count III (Instruction No. 7) are in part also covered in the damage instruc-

tion on Count V (Instruction No. 8). In other words, the $73,000.00 verdict returned by the jury as actual damages under Count V is also a part of the $261,000.00 verdict returned by the jury as damages under Count III.

This is a suit governed by the Missouri law, and the Missouri courts have held that plaintiff cannot recover twice for the same claim. *Borserine* v. *Maryland Casualty Co.*, 112 F. 2d 409, 416; *Ingram* v. *Great Lakes Pipe Line Co.*, 153 S. W. 2d 547. The Eighth Circuit Court of Appeals in *Greenwood Ranches, Inc.* v. *Skie Construction Co., Inc., et al.*, in an opinion filed on August 11, 1980, at the bottom of page 6 and top of page 7 of the opinion deals with a similar problem, and in part the Court said, page 7:

> "In this situation, a plaintiff is not entitled to a separate compensatory damage award under each legal theory. On the contrary, he is entitled only to one compensatory damage award if liability is found on any or all of the theories involved. (Citing cases.)"

The instructions referred to above as given are clearly erroneous as they permit assessment of double damages, and double damages were assessed by the jury. The double recovery by the plaintiff alone is basis for a new trial. Turning further, however, to the jury verdict of $750,000.00 in punitive damages, the prayer of the complaint asked for only $500,000.00 in punitive damages, some $250,000.00 less than the jury awarded.

The attorney for the plaintiff in arguing damages to the jury had this to say with respect to Count V:

> "Here are the expenses for January 7, 1977, computed in the same fashion, and here with the cutoff period 12,000 in fiscal '77; 42,000 fiscal '78; and 17,000 in fiscal '79. These would be the best computations we could make for the fraud actual damages. * * * And in addition, we ask for

punitive damages because what they did id the fraud was willful, wanton and malicious, and we suggest to you when you come to assess punitive damages you consider how much money it would take to deter Basic/Four and others like them from ever doing this to another distributor. I suggest something in the neighborhood of two or three times, or three or four times our damages on fraud."

In *Northern* v. *McGraw-Edison Co.*, 543 F. 2d 1336, 349-50, the Eighth Circuit Court of Appeals said:

> "Under Missouri law, '[t]he question of whether or not punitive damages shall be awarded, and, if so, in what amount rests peculiarly in the discretion of the jury.' *Wisner* v. *S. S. Kresge Co.*, 465 S. W. 2d 666, 669. * * * However, the amount of damages, which also rests in the discretion of the jury, 'must have some reasonable relation to the injury inflicted.' *Wisner* v. *S. S. Kresge Co., supra* at 669. (Citing other cases.)"

While there is some doubt as to whether under the present record there is sufficient basis for punitive damages, even if proper, the $750,000.00 given by the jury in the punitive damages award, as set out above, is beyond the amount of the prayer, disproportionate to the injuries suffered, if any, and an abuse of discretion on the part of the jury. This is further illustrated by the fact that while it took nine days to try the case, the jury returned a verdict in twenty minutes after it was submitted to it by the Court.

Accordingly, the Court sets aside the verdict and judgment entered in favor of the plaintiff, and defendant's motion in the alternative for a new trial is sustained, and a new trial is ordered.

/s/ Illegible
U. S. District Judge

APPENDIX B

Excerpt Of Testimony Of Plaintiff's Certified Public Accountant, George Springman, At The First Trial

[360] AFTERNOON SESSION, WEDNESDAY, MAY 2, 1979

Pursuant to adjournment as aforesaid, at 1:45 o'clock P.M. of said Wednesday, May 2, 1979, the court met, present and presiding as before, and the trial proceeded as follows:

THE COURT: Call your next witness.

MR. RUTHERFORD: Mr. Springman.

GEORGE L. SPRINGMAN,

being produced, sworn and examined in behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Rutherford:

Q. What is your name, please, sir?

A. My name is George L. Springman.

Q. Where do you live, Mr. Springman?

A. 1931 Muir Woods Lane, St. Louis, 63131.

Q. What is your profession or occupation?

A. Certified public accountant.

Q. Are you with a firm?

A. I am, sir.

Q. What is the name of your firm?

A. Curry, Lenhardt and Company.

Q. How long have you been a certified public accountant?

A. Since 1970.

[361] Q. Do you have any connection with St. Louis Business Products Center in your accounting work?

A. Yes, sir.

Q. What is that connection?

A. My firm has been doing the accounting and audit work for the Business Products Center companies for more than 20 years.

Q. Do you have some relationship in your — strike that.

Do you personally have some relationship with those companies in your accounting work?

A. Yes, sir.

Q. What is that?

A. I have personally been responsible for supervising management of the accounting and auditing work for many years.

Q. For all the companies?

A. For all of the companies, yes, sir.

Q. Does that include Central Microfilm Company?

A. Yes, sir.

MR. RUTHERFORD: Would you mark this, please?

(A document, handed to the reporter, was marked for identification as Plaintiff's Exhibit 65A.)

MR. BARON: Was this on the list of exhibits or [362] not? This is the one today?

MR. RUTHERFORD: This is the one that I gave you today, that's right.

THE COURT: Let me see what it is. Off the record.

(Whereupon, a short discussion was had off the record.)

Q. (By Mr. Rutherford) Were you requested to prepare a comparative statement of income and expense for St. Louis Information Systems Division of Central Microfilm?

A. Yes, I was.

Q. Have you prepared several such statements?

A. Yes, sir.

Q. I hand you what's been marked as Exhibit 65A. When was that statement prepared?

A. This statement was prepared April 20, 1979.

Q. Well now, is that what you have before you not a revision of the April 20 statement?

A. This is a revision of the April 20 statement.

Q. When was the revision prepared?

A. Last night.

Q. I direct your attention to page 1 of 65A to the two items at the bottom of page 1, and these adjustments are as a result of the stipulation of counsel, and I'm [363] simply going to lead you through these, if there is no objection.

Is it the case that the two adjustments at the bottom of page 1, "Reduction in cost of sales" in the amount of $2,710, the "Increase in income," both of which are indicated as resulting from the stipulation of counsel, the latter being $24,139, is it the case that those were made on my instructions?

A. Yes, sir.

Q. Is it also the case that — strike that.

Now, did you also last night make certain revisions in the 1979 figures for expenses.*

A. Yes, sir.

Q. And for income?

A. Yes, sir.

Q. Any changes to the figures for the years 1976, '77 and '78 as between the April 20 statement and this revised statement?

A. No, sir.

Q. What changes were made in the expense and income figures for the year 1979 as between the April 20 statement and this one?

MR. BARON: Your Honor, I wish to interpose an objection at this point. I'm going to object to any **[364]** testimony from this statement from this person until a foundation is laid for it.

There are no numbers that can be testified to until we know how the numbers were prepared, until the scope of what the employment was on this thing becomes obvious. It's been testified he's a certified public accountant. It's not clear in what capacity this was prepared, your Honor.

I think that the statement is hearsay. I think it's not an accountant's opinion. I don't think it's — if I hear their basis, I have a series of other objections which I'd like to interpose at that time, after we hear the basis that we might have for putting this in. I'd reserve the right to make that. At this time I'd like to object on the basis of I would want to know how this is coming in.

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* It is undisputed that these revisions were to shorten the cut off time for calculations pertaining to certain items in Fiscal 1979 and resulted in a small reduction of the losses claimed.

MR. RUTHERFORD: It's my intention at this point simply to show the nature of the revisions and why, as to demonstrate the relationship between this statement and the one furnished to counsel on April 20, and I will be happy to take them seriatim as I go through.

MR. BARON: My point is —

THE COURT: You're going to have to lay a foundation for it. There isn't any question about that.

[365] MR. RUTHERFORD: All right.

Q. (By Mr. Rutherford) I direct your attention to page 2 of 65A.

MR. BARON: I make the same objection.

THE COURT: Same ruling. You're going to have to lay your foundation before you get into that. There isn't any need in trying to get into the details of it until you lay a foundation, what it is, where it came from, what it's all about, whether he's in here properly.

Q. All right. Would you please describe generally how this statement was prepared?

A. In general terms, the statement was prepared by —

THE COURT: Don't get into general terms. You're going to have to get into specifics.

THE WITNESS: The statement was prepared by taking the accounts attributable to the St. Louis Information Systems* —

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* St. Louis Information Systems or, S.I.S., was the unincorporated division of Central Microfilm Service Corporation which conducted Central Microfilm's Basic/Four dealership.

THE COURT: You're going to have to get more specific than that. You're going to have to tell us where they came from, what this is. In other words, this jury is entitled to know, they're going to have to know where you got this information, what it's from, and you're going to have to have those records here to support it.

Now, you're going to have to lay your foundation. **[366]** If you don't, you're wasting your time on this. If you haven't got that stuff in here, you're probably in trouble here.

MR. RUTHERFORD: It's here. It's all here.

Q. (By Mr. Rutherford) Will you please describe generally how the statement was prepared and from what source?

THE COURT: Not generally, specifically. There's no general to it. You're not getting into it in general. You're going to have to get into the details on this thing because this is an exhibit that was prepared from something else.

MR. RUTHERFORD: I will, your Honor.

THE COURT: You're going to have to get specific with it. They're objecting to it, so there's no need in wasting their time on the other. Just lay your foundation.

MR. RUTHERFORD: If your Honor please, I plan to simply take advertising expense —

THE COURT: I don't care what you plan to do. You're going to have to let him tell you where it comes from. If they want to see it, they've got a right to see it. In other words, he's got a summary here, and it's based upon something else. The jury is entitled to know where it came from. They're entitled to see it and cross-examine on it **[367]** if they want to. If it isn't in the books, what is it, who's responsible for putting it there, how it came about. He may not even know that, I don't know, but that's your problem.

I don't know what he knows about them. The jury doesn't know, either. In other words, you're going to have to get your foundation before you start dealing with the figures in here.

MR. RUTHERFORD: If the court please, let me try it this way; what specific records is Exhibit 65A based on?

MR. BARON: Excuse me, your Honor, I'd like to know who did what to these records, if he prepared it. We don't even know that.

THE COURT: I think we're going to have to show that.

MR. RUTHERFORD: Let me try it a different way.

Q. (By Mr. Rutherford) There's an advertising item on the expense statement —

MR. BARON: Excuse me, I object to any testimony —

THE COURT: Sustained. You're going to have to lay your foundation as to who prepared it, what it's prepared from, where it come from. This is nothing but a summary.

Q. (By Mr. Rutherford) Who prepared the statement, [368] Mr. Springman?

A. The statement was prepared under my supervision by two other staff members from our firm.

Q. What function did you have in the preparation of the statement?

A. My function was supervisory. I did assist in some of the field work.

Q. What records were used?

A. The records that were used were the general journal.

Q. Of what company?

A. I'm sorry, the general ledger of Central Microfilm Service Corporation and the various journals, the cash receipts journal, the cash disbursement journal, sales journal, and payroll journal, all of Central Microfilm Service Company.

MR. RUTHERFORD: May I approach the bench?

(Colloquy between counsel and the court in the presence of but out of the hearing of the jury.)

THE COURT: Take the jury out.

(Whereupon, the following proceedings were had out of the presence and hearing of the jury.)

THE COURT: What is it you all are wanting to do? You can speak out. The jury is out of the room. Let's see [369] if we can get squared away.

MR. RUTHERFORD: We'll take you through what this is, what we propose to prove. The statement shows expenses and income. The second page consists of a number of expense items. There are accounts which cover most, if not all, most of these items, they are coded within the Central Microfilm.

THE COURT: We don't need you to make a statement. This is the man you wanted, you brought him here, you're going to have to get into it with him. What I want to know before you get into this is what you're talking about, where it comes from. These people don't have to take his word for it. They're entitled to see the basis on which it came from.

MR. RUTHERFORD: Judge, they have had these records —

THE COURT: I don't care anything about that. That hasn't got anything to do with it. You're in the trial now. The fact they may have looked at something doesn't mean anything. The fact that you show them something doesn't mean it's proper testimony on the part of either side of you.

MR. RUTHERFORD: All right.

THE COURT: Let me ask you a question; you made [370] this from books and records?

THE WITNESS: Yes, sir.

THE COURT: Have you got the books and records that you can point those figures out on?

THE WITNESS: Yes, sir.

THE COURT: All of them?

THE WITNESS: Yes, sir.

THE COURT: No estimates?

THE WITNESS: There are allocations.

THE COURT: Allocations in the books?

THE WITNESS: No, sir.

THE COURT: That's the problem you're getting into. In other words, they're not going to take this at face value. In other words, you've got the books and records of the parent company?

THE WITNESS: Yes, sir.

THE COURT: Do they have a separate outfit for S.I.S.?

THE WITNESS: No, sir.

THE COURT: And you don't want the jury to know, they're not entitled to know it before he gives them a lot of figures?

MR. RUTHERFORD: Judge, I was going to have him give the figures. I was going to explain how it was done [371] first before talking about any figures, and the only way —

THE COURT: I haven't heard you say anything about it except you want to point out a figure. I asked you to qualify him as to where this come from, what it is, whether or not it's based

upon facts, or whether or not it's based upon suggestions, allocations, and stuff of that kind; in other words, whether or not it is book entries or whether or not it's made from what somebody told him to make.

MR. RUTHERFORD: There are some book entries, most of the entries are book entries.

THE COURT: S.I.S.?

MR. RUTHERFORD: Yes.

THE COURT: He said not.

THE WITNESS: There isn't a separate general ledger —

THE COURT: What have you —

THE WITNESS: — within the Central Microfilm general ledger, there are accounts specifically designated.

THE COURT: I asked if you had anything about it and you said no.

THE WITNESS: Well, it's not — I understood, I thought you were referring to a separate general ledger.

THE COURT: I asked you if in those books there [372] were items that are carried throughout the thing as S.I.S.?

THE WITNESS: Well, that there are, yes, sir.

THE COURT: What categories?

THE WITNESS: Revenue and expenses and a few assets.

THE COURT: What's the allocations?

THE WITNESS: There are the allocations which have been made on general and administrative overhead items.

THE COURT: The other specific items are in there coded S.I.S.?

THE WITNESS: Yes, sir.

* * * * * * *

APPENDIX C

Excerpt Of Testimony Of Plaintiff's Certified Public Accountant, George Springman, At The Second Trial

[745] GEORGE L. SPRINGMAN,

Of Lawful Age, Having Been First Duly Sworn To Testify The Truth, The Whole Truth, And Nothing But The Truth In The Case Aforesaid, Testifies And Says In Reply To Oral Interrogatories Propounded As Follows, To-Wit:

Direct Examination

Questions By Mr. Rutherford:

Q. What is your name?

[746] A. My name is George L. Springman.

Q. Where do you live, Mr. Springman?

A. I live at 1931 Muir Woods Lane, Town and Country, Missouri.

Q. What is your profession or occupation?

A. I'm a Certified Public Accountant.

Q. With what firm are you?

A. With the firm of Curry Lenhardt and Company.

Q. How long have you been a certified public accountant?

A. Since 1970.

Q. How long have you been with Curry Lenhardt?

A. Since 1966.

Q. Have you had occasion to work on the St. Louis Business Product Companies' accounting work?

A. Yes, sir.

Q. For how long?

A. Since 1966.

* * * * * * *

[758] [By Mr. Walpin]

Q. And what — am I correct what you are prepared to testify to is a report based upon allocating expenses and revenues in evaluating the computer dealership?

A. I'm expecting to testify on the direct expenses of the St. Louis Information Systems and the allocation of the indirect expenses which we made the indirect expenses of [759] Central Microfilm.

Q. And am I correct that that allocation was not done as part of your normal audit work for Central Microfilm?

A. It was not. That's true.

MR. WALPIN: I renew my objection, your honor.

THE COURT: Take the jury out.

(Following proceedings were had out of the presence of the jury):

THE COURT: What are you purporting to show?

MR. RUTHERFORD: I am purporting to show, if your honor please, Defendant's Exhibit 65B.

THE COURT: I want to know what you're purporting to show.

MR. RUTHERFORD: That he was taken from the books and records, traced back to the original invoices the expenses and the revenues, and that he has made a calculation of direct expenses and revenues, and that he has made allaocations of overhead expenses not allocated on the books, but —

THE COURT: Be kind enough to tell me now — we've been through some of this once before. Part of it is nothing in the world but general accounting on expenses and income.

MR. RUTHERFORD: That's all it is, judge.

THE COURT: No, it isn't all it was before, and it [760] isn't all he indicated here. He didn't say that that's what these exhibits were.

Are these — these are not the exhibits you had here before in this other case, is it?

THE WITNESS: 65A and 65B are, yes, sir — 65A and 66A. 66B and 66A are revised.

THE COURT: And how are they revised? In what respect?

A. We have — the exhibits were subject to scrutiny by Touche Ross. Touche Ross sat in on my deposition. I sat on the deposition of the Touche Ross expert, and we agreed upon errors, certain errors and changes within the statements. Some of the changes —

THE COURT: Now, don't start in on that. Now, you remember when you were here before in the trial of this case and you remember some of the problems we had, and part of those was a result of stuff that was not shown in the books?

THE WITNESS: Yes, sir.

THE COURT: Is part of that in these things?

THE WITNESS: Yes, sir.

THE COURT: Well, that's the part that I'm talking about. Now, if they are anything like they were before, part of them are based solely and primarily on the books, and I assume with that you have no quarrel.

MR. WALPIN: No quarrel, your honor.

[761] THE COURT: But when you get to the allocation of the other part, we had trouble with that before and you're going to have trouble again, and I'm telling you now unless you can further qualify it, you're going to be limited to that other part.

Now, I went down this road before, and I got trapped into it, and I'm not going to get trapped in again because the testimony, as I recall it, was based not upon books at all, but upon figures that were given to you by certain people in the company and who told you to put them there and you put them there. And we're not going to get into that again.

MR. RUTHERFORD: Judge, 65B covers the entire period and is a revision of 65A, which was the exhibit that went into evidence last time.

THE COURT: I don't care what went into evidence before. I'm saying to you that the exhibits that can be used that he can testify that's based upon what comes outside of those books. You have no objection to, right?

MR. WALPIN: That is correct, your honor.

THE COURT: And he's entitled to put them on, but when you get beyond that is where we're going to have your troubles. I don't know what 65B or A or any of it, I don't know what they show.

MR. RUTHERFORD: Judge, would you let me, for [762] about five minutes, tell you?

THE COURT: No, I won't let you. He can tell me. He just got through telling me that part of it isn't based on the books. Now, we had that before and it got in before it could be stopped, and we had nothing but problems with it.

And I'll say it to you, frankly one of the main reasons I gave a new trial was because, in my opinion, I should never have let this witness testify as an expert because you didn't list him as an expert. You listed him this time so we've got that, but he did not qualify before as an expert in the other field. He didn't base the information that he had given in this record before upon what the books or anything showed or what he come up with but with what certain people in the company told him to put there.

Now, that's what the record was on it, and we're not going to get into that again. Now, you can put what those books show, and they are not objecting to that, and you might as well — I would suggest you do that if you have it in a form and then we'll cross the other when you get to it.

But I can tell you that based upon the — what he said at this point, you're going to have to really qualify it and get down to that, and I'll take that part when we get to it. If you don't have them broken down into that basis, [763] you can get them broken down. Are part of them in that basis — that basis?

THE WITNESS: Yes, sir.

THE COURT: Which ones are based solely upon the figures from the books?

THE WITNESS: Everything in the operating expense —

THE COURT: I don't care anything about that. In these exhibits, is there any of these exhibits that is limited only to that?

THE WITNESS: No, sir.

THE COURT: Is there any parts of the exhibit that is limited only to that?

THE WITNESS: Your honor, there are about three accounts, three expense accounts, that have charges from another company, charges that were paid by another company.

THE COURT: Bring the jury in and let me send them home until Thursday.

* * * * * * *

[764] (DISCUSSION OFF THE RECORD)

(JURY EXCUSED)

THE COURT: Now, gentlemen, we were down this road when we tried this case before, and, as I recall it, I have a fair recollection of it. There was a considerable amount of testimony that dealt only with income, expenses and some matters of that kind, right, that pertained only to sis?

THE WITNESS: Yes, sir.

THE COURT: And then they went beyond that and we got into fields. We got it in there, and then when they got into the other part, it developed that it was not based upon any records set out in the books, period. And what I'm saying to you now is that the two are completely different.

Now, as I understand the defense, they are not complaining about what's actually in the books and records, right?

[765] MR. WALPIN: That is correct, your honor.

THE COURT: There's no argument about that. There's no question but what you're entitled to put that in. But when you come to the other part, it presents a completely different story, and unless you got a better foundation than what you had before, what you put in before, you're not going to get in before this court, in this trial.

MR. RUTHERFORD: If your honor please, what I anticipate — what I anticipated when I came here with this case this time is this. We have made a considerable effort to eliminate any issue about whether or not an invoice is or is not included in these calculations. Everything — that is every bit of arithmetic — let me put it that way, every bit of arithmetic is my belief has been checked by —

THE COURT: He just said that every bit of the arithmetic is not every bit of the arithmetic.

MR. RUTHERFORD: May I finish?

THE COURT: You may finish. I said did he not say it was beyond that? Now, you didn't make it.

MR. RUTHERFORD: I did not make it.

THE COURT: Are you telling me that there's nothing in here but what's in the records and books that they reported for income tax purposes at SIS?

MR. RUTHERFORD: Did some of them get into the general ledger? No, they didn't. Is there a payroll [766] figure —

THE COURT: I didn't ask you that. I said are you prepared to tell me that all the entries that are in that, if you know?

MR. RUTHERFORD: Mr. Tipton's salary is a known figure. He gave testimony that there's ten per cent.

THE COURT: I'm not going to get into that. That's part of the other part of the situation, and I'm suggesting to you that you can take the part there's no argument about and then when we get to the other part as to what his salary — he's already testified that he got a certain per cent of the — off of the sales, and this, that, and the other.

MR. RUTHERFORD: That's in there. There's no question about the fact that that's in there and —

THE COURT: Just let me finish. I made clear to you what you have and unless you want to do that, they are out. Now, I'm just not going to get into it with respect to what I got into it before.

In other words, as to the matters that are in dispute as to the matters that are being argued about, you can take up separately after you put in the bare bones that are in there, and they are in there where you can tell them?

THE WITNESS: Yes, sir.

THE COURT: Yes, sir, they are there. So you got [767] no problem doing it.

MR. RUTHERFORD: Judge, the defense has developed that figure. It's in their statement. There's a difference of a hundred and sixty five thousand dollars between his number and the defense's number. There isn't any question about their number. There isn't any question about his number, and the difference amounts to three items.

It amounts to whether or not there's an appropriate allocation of a whole group of overhead figures. It amounts to whether or not the certain expenses, which are attributable to the first computer, are properly charged, and there's an issue of whether or not expenses which are attributable to the second computer are properly charged, and those are the only issues that need to be tried.

THE COURT: Well, I'm saying to you that you can put the other stuff in where you have it and we'll try those and you can reach that point and we'll cross that bridge when we get to it. But I'm going to see what they are when we get to it.

If it's like they were before like some of them, I'm not going to let them in.

MR. RUTHERFORD: Judge, I don't want to tell the jury that the damages are ninety five thousand dollars. My case is that the damages are two hundred and sixty one thousand dollars, and that includes some allocation of [766] overhead, and it includes costs on the —

THE COURT: I don't want to argue. I'm telling you what you can put in without the argument, and then we'll take that other piece by piece.

You haven't qualified your man here today, in my opinion, as an expert, and he didn't qualify himself before the other. He said he put in there what Mr. Tipton told him to put in there.

Now, you can do anything you want to. I don't care what you do. I'm trying to be fair with you and tell you that you're going to do it the — that I'm not going to let you take the matters that are disputed and just wade out there and say, "here they are." No way. We're going to cross each one of them when we get to them.

You know and I know that they are completely separate. You know and I know and he knows that they were not in the original setup that he had here before, that he jacked that thing up before as a result of cutting around with it three or four times and as a result of what some of your clients told him. Now, that testimony I'm not going to let in unless he has got some other basis.

I announce a recess as far as you're all concerned until ten o'clock Thursday. You can do whatever you want to do about it. I'm telling you what's going to happen on it.

The last time I let you go without even listing [769] him as an expert. You listed him as an expert this time and, in my opinion, it's a sixty four dollar question whether or not he is an expert.

(Adjournment)

APPENDIX D

Excerpt From The Dealer Agreement

DEALER AGREEMENT

AGREEMENT made as of the 27th day of February, 1975 by and between BASIC/FOUR CORPORATION ("Seller"), a corporation duly organized and existing under the laws of Delaware, having a principal place of business at 18552 MacArthur Boulevard, Irvine, California 92707, and CENTRAL MICROFILM SERVICE CORPORATION ("Dealer"), a corporation duly organized and existing under the laws of Missouri having a principal place of business at 1601 Washington Ave., St. Louis, Missouri 63103.

In consideration of the covenants and undertakings hereinafter set forth, the Seller and the Dealer agree as follows:

1. Definitions

The following terms when used in this Agreement shall, except where the context otherwise requires, have the following meanings (such definitions to be equally applicable to the singular and plural forms thereof):

A. The term "Territory" shall mean the geographical area described in Schedule A annexed, as the same may from time to time be amended in accordance with paragraph 29.

B. The term "Product" shall mean any product, including (unless the context otherwise requires) any component, device, feature or accessory thereto, manufactured by or for the Seller which is listed in Schedule B annexed, as the same may from time to time be amended in accordance with paragraph 3.

C. The term "System" shall mean a computer bearing Seller's trademark which is included in Schedule B.

* * *

[2] 2. Appointment

A. Subject to the terms and conditions of this Agreement, the Seller hereby appoints the Dealer, and the Dealer hereby accepts, the appointment as the exclusive dealer of the Seller for the Products in the Territory.

* * *

[9] 13. Software

A. The Dealer shall be responsible for providing adequate software programming to meet the requirements of purchasers of Systems from it. Such programming services shall also meet reasonable standards established from time to time by the Seller.

B. The Seller will, if requested by the Dealer, provide the Dealer with the Preplanned Applications. The Seller shall provide, at no charge, to the Dealer one (1) copy of the existing documentation relating to each Preplanned Application and one (1) copy of the related software placed on disc cartridge(s) provided by the Dealer or sold to the Dealer as provided in subparagraph E, provided that each such set may be used by the Dealer only for demonstration **[10]** purposes and may not be sold or furnished to any third parties. The Dealer shall pay to the Seller a royalty fee as set forth in Schedule C each time a Preplanned Application is installed on a user's System sold by the Dealer. The Dealer shall, within ten (10) days following the end of any calendar month, report to the Seller as to the Preplanned Applications installed within such preceding month (including, without limitation, the name and address of the user) and shall, within thirty (30) days following the end of any calendar month, pay the royalty fees due for such month, together with any applicable sales or use taxes thereon. The Dealer shall not sell the Preplanned Applications to any person, firm or corporation at any prices other than those set forth in Schedule C. The Seller may, on ninety (90) days' notice, change

the prices or royalty fees for Preplanned Applications at any time and from time to time, provided that the changes are made applicable generally to dealers of the Seller in the United States. The Seller shall furnish to the Dealer, at no charge, all revisions and updates to the Preplanned Applications if the original has theretofore been requested by the Dealer. Training with respect to use of the Preplanned Applications shall be furnished to the Dealer as provided in paragraph 11.

C. To the extent available, the Seller shall provide the Dealer with a list of the User Software and the Dealer may request that the Seller furnish the Dealer with documentation and programs for any specific User Software. If so requested and if available, the Seller will furnish the related User Software to the Dealer for a fee based upon the Seller's time, billed at a rate of $20 per hour or such other rate of the Seller as then in effect, and its expenses. The Seller shall invoice the Dealer for such fees and expenses, which invoices shall be payable within thirty (30) days from the later of the date of invoice for the User Software or the date of delivery thereof. The Seller may, on ten (10) days' notice, change its fee at any time and from time to time. Training and other services with respect to the User Software will, at the Dealer's request, be furnished at the Seller's then current rates.

D. Upon termination or cancellation (by the Seller) of this Agreement, the Dealer shall return to the Seller the Preplanned Applications and the User Software furnished to it and not installed at a user of a System for which payment has been made. In the event that the Seller so elects, or if this Agreement is cancelled by the Dealer, the Dealer may therafter continue to exercise the license described in subparagraph G provided all royalty fees are paid to the Seller.

E. The Seller will invoice the Dealer for disc packs [11] related to the Preplanned Applications or the User Software at prices set forth in Schedule B less a discount of 33%.

F. The Dealer is authorized to obtain or create its own software packages, provided that such packages will be compatible with, and will in no way damage, the Systems. Except as provided in subparagraph B, the Dealer may determine its own price to purchasers from it for any software programming (including, without limitation, User Software) furnished to any such purchaser.

G. To the extent that the Dealer and purchasers of Systems from it wish to utilize the Preplanned Applications or User Software, the Seller hereby conveys to them a nonexclusive, nonassignable license for use of the Preplanned Applications or User Software, with the Systems, but such license does not include the right to reproduce, publish or license the Preplanned Applications or User Software, to others. The Seller reserves expressly, and the Dealer and purchasers of Systems from it expressly consent that, the entire right and title to the Preplanned Applications or User Software shall remain with the Seller, and the Seller has the exclusive right to protect by copyright or otherwise, to reproduce, publish, sell and distribute such material to anyone. In recognition of the Seller's proprietary rights in the Preplanned Applications or User Software delivered to the Dealer and purchasers of Systems from it, they further agree to place on each copy or reproduction of the Preplanned Applications or User Software the identical notice contained on the Preplanned Applications or User Software furnished by the Seller to the Dealer.

H. The Seller believes that the Preplanned Applications or User Software being furnished hereunder are accurate and reliable, but the Seller does not assume any liabilities with respect thereto. Reference is made to paragraph 15.

I. The Preplanned Applications or User Software are furnished to the Dealer as a convenience and aid to the Dealer and the furnishing of the Preplanned Applications or User Software shall in no way relieve the Dealer of the responsibility to provide adequate software programming services for purchasers of Systems from it, as provided in subparagraph A.

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APPENDIX E

PLAINTIFF'S EXHIBIT 163*

THE BASIC/FOUR CORPORATION DEALERSHIP PROGRAM

Introduction

The Basic/Four Corporation markets its computer products through three direct marketing channels, Basic/Four Corporation Branch office locations, Dealerships, and MAI International.

Branch offices are established in approximately 13 locations with MAI International marketing in 15 foreign countries. Dealerships are now operating in the United States in four locations, with new locations opening monthly.

There are more than 1400 BASIC/FOUR computer systems installed.

The following paragraphs present in abbreviated form the essence of the dealer agreement.

Territory

Basic/Four Corporation grants to qualified dealers, approved by Basic/Four Corporation, exclusive dealerships of the BASIC/FOUR computer system product line.

These dealerships are established in certain cities within the United States that have a minimum of 1,000 companies with twenty or more employees per the Dun & Bradstreet current listings.

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* Exhibit 163 as admitted in evidence contains certain handwritten notations which do not bear in any way on the issues at hand. They have therefore been omitted from this printed copy of Exhibit 163.

The dealership territories are established within a twenty to forty mile radius of the geographic center of these metropolitan areas.

Marketing

The dealer must employ, for the sole purpose of marketing the BASIC/FOUR product line, a sufficient number of sales personnel and software personnel to support the marketing effort and obtain quota.

Dealer performance is measured by a previously agreed to quota. This is based on a multiple of 1,000 prospects in a dealer's territory containing more than twenty employees.

It is expected that each dealer will sell five systems per 1,000 prospects the first year of operation; ten systems the second year of operation; and ten systems the third year of operation.

The dealer must establish and maintain appropriate, attractive and accessible premises and facilities for the display and demonstration of the system.

The dealer must purchase a BASIC/FOUR system for the sole purpose of display and demonstration. This system is not part of dealer's quota and is purchased at a forty per cent discount.

The dealer must undertake promotional compaigns and canvass prospective users to stimulate the sale of the BASIC/FOUR product.

The dealer purchases all computer hardware from Basic/Four Corporation at a 33 per cent discount.

Basic/Four Corporation provides as part of the price of the computer system the systems software, BOSS (BASIC Operating Systems Software).

Software

The dealer will provide by whatever means he feels necessary all required application software contracted between the dealer and the dealer's customer for the satisfactory performance of the system. Applications software can be a source of additional revenue for the dealer.

Basic/Four Corporation has a customer reference file of installed customers that is available to the dealer for the specific purpose of reference selling the product line to new customers in the dealer's territory.

Basic/Four Corporation will provide free of charge technical assistance on all aspects of marketing the BASIC/FOUR product line, and has established a corporate dealership department to interface with established dealers via teletype, telephone or in the dealer's territory.

Maintenance

The dealer is required to enter into an agreement with SORBUS, Inc. to provide the warranty and continuing maintenance of all BASIC/FOUR equipment installed in the dealer's territory. SORBUS, Inc. is the largest independent maintenance and service organization in the United States that specializes in data processing equipment. SORBUS services over 34,000 units of data processing equipment — with service in over 100 cities across the nation, and it employs approximately 1,000 service personnel.

Basic/Four Corporation Support

Basic/Four Corporation will provide direction and assistance to the dealer on all advertising, sales promotion, and public relations campaigns conducted in the dealer's territory. This can take the form of ad mats, national advertising and publicity. In addition, the entire introductory promotion campaign of the BASIC/FOUR product line in comparable localities has been tried, tested and proven and is totally documented for the benefit of the new dealer.

Basic/Four Corporation will provide sales and systems training of dealer personnel at Basic/Four Corporate offices at no charge. The dealer is required to pay all transportation, meals and lodging expenses for such personnel. If the dealer elects, the training of dealer personnel can be accomplished at the dealer's location. In this instance, the dealer must pay all expenses incurred by Basic/Four Corporation to conduct this training at his location.

Basic/Four Corporation will provide promotional materials at current printing costs to the dealer for the purpose of marketing the BASIC/FOUR product line.

Administration

The dealer must demonstrate to the satisfaction of Basic/Four Corporation that it has sufficient equity to finance its accounts receivable and to pay Basic/Four Corporation for its purchase of BASIC/FOUR systems within thirty days from the date of invoice or the date of delivery to the dealer, whichever is later.

The duration of the Dealership Agreement is for a three-year period, renewable for one year intervals thereafter if required quota has been met.

The dealer shall not manufacture, sell, deal or otherwise be interested in any systems directly competing in the territory with the BASIC/FOUR system.

The dealer nor Basic/Four Corporation shall employ any employees of the other for one (1) year.

Products

The products are those computer systems and add-on items presented in the accompanying sales literature.

The dealer can provide software services to his customers and realize revenue in addition to revenue from hardware.

APPENDIX F

PLAINTIFF'S EXHIBIT 8

Basic/Four Corporation

November 25, 1975

Mr. Robert D. Bodkin
President
Central Microfilm Service Corporation
1601 Washington Avenue
St. Louis, Missouri 63103

Dear Mr. Bodkin:

Thank you for the time and courtesy extended to me during my recent visit to St. Louis. I know that we both are unhappy with the performance of the BASIC/FOUR dealership to date and agree that through a concerted, dedicated effort, this situation can be resolved and that we can expect the success we both desire.

As we discussed in our meeting, we have completed the first six months of our dealership year together as of October 31, 1975, and it is appropriate to review the past performance and to make plans for the six-month period ahead.

During the period May 1, 1975, through October 31, 1975, Schedule D of your Dealership Agreement established a purchase quota of $192,000. Purchase orders from St. Louis Information Systems during this period totaled $64,422 which represents a 33% attainment of quota.

Schedule D of your Agreement calls for purchase quota to be increased to $288,000 for the period November 1, 1975, through April 30, 1976. This coupled with the deficiencies from the first six months will require purchase orders of a minimum of $415,578 over this six-month period.

BASIC/FOUR would like to propose the following plan, which we discussed and agreed to in our meeting, to assist you in attaining 100% of quota for your first year:

1. St. Louis Information Systems should increase the BASIC/FOUR sales staff to sell at the prescribed quota level. This staff should consist of at least three men, in addition to Mike Frankwicz, so you must begin immediately recruiting activities to hire a minimum of two additional marketing representatives.

2. Our experience has proven that proper sales training is essential for the greatest assurance of success. We hold Sales Training Classes at our Corporate Headquarters in Irvine, California on a regularly scheduled basis which is available to both BASIC/FOUR employees and employees of our dealerships. Neither of the salesmen that you have hired since becoming a BASIC/FOUR dealer have attended this school, and we feel the absence of this training has created a longer lead time to productivity. With this in mind, we recommend that the new salesmen that will be hired attend the Sales Training Class which is scheduled for January 19th. We recognize the cost to St. Louis Information Systems in both money and time, but we are confident that their attendance will create an end product that will return dividends far in excess of this expenditure.

3. Systems installation and programming manpower for the approximate eleven systems which you need to sell in the next six months is estimated at two men, if these are CBS installations. Obviously, if these are to be custom installations your requirements will double. It will be necessary for you to hire one additional systems man immediately, and make plans for the second person in concert with your sales achievement. Success beyond the minimum established goal will require additional staffing, and we advocate that you begin to develop outside software vendor master agreements to provide an alternative to increased staffing.

4. CMSC has developed an outstanding reputation in the St. Louis marketplace over the past twenty-seven years, and this must be used for the development of credibility of the BASIC/FOUR operation. This can best be accomplished by the direct personal involvement of yourself and Jack Tipton.

5. The prospect/suspect base which has been developed through leads from both BASIC/FOUR national advertising and marketing representatives in other areas of your company, coupled with the normal marketing activities of the BASIC/FOUR staff appears to be of significant enough volume to anticipate at least three immediate potential closable situations. To accomplish this, a team concept should be immediately undertaken. This team will consist of yourself, Jack Tipton, Mike Frankwicz, Jerry Berlinger, and the newly hired salesmen. All prospects should be analyzed and rated as to the immediacy of close, and a marketing plan should then be developed for each one. Concentrated activity should commence so that a minimum of three systems can be secured by December 31, 1975.

The establishment of these objectives with adherence and dedication to the same can only have one result—the success we mutually desire. The hiring of additional marketing and systems people with involvement by upper management in hiring and closing will relieve Mike Frankwicz of the present situation of having to wear three "hats." On January 1, 1976, the deficiencies in quota attainment and manpower should be resolved, and Mike will be in a position of exercising his capabilities as a General Manager of this important division of your operation. We should then look forward to a minimum of two orders each and every month through April, which will bring you in excess of your quota objective for the year.

We at BASIC/FOUR are willing and anxious to work with you toward a successful dealership in St. Louis. I am confident

that these mutual efforts will assure us of obtaining our objectives.

Sincerely yours,

BASIC/FOUR CORPORATION

Donald D. Kirkwood
Dealership Manager
Central Region

DDK:kp

APPENDIX G

Plaintiff's Exhibit 15 A

Basic/Four Corporation

May 25, 1976

CENTRAL MICROFILM vs. BASIC/FOUR
Defendant's Exhibit T

Mr. Robert D. Bodkin
President
St. Louis Information Systems
1601 Washington Avenue
St. Louis, MO 63103

Dear Mr. Bodkin:

On April 30, 1976, the one year anniversary of your BASIC/FOUR Dealership in St. Louis was reached, and I would like to address myself to your performance during this period. The Dealership Agreement executed by you and Basic/Four Corporation on February 27, 1975, established in

Schedule D Purchase Quotas for the first year in the amount of $480,000. You have attained during this same period, one (1) system order for a total of $91,106 of business which represents a total first year performance of 18.98%.

Basic/Four Corporation has elected not to invoke its cancellation privilege under Paragraph 6.A.2.d. of the Agreement and to enter into a Probationary Status Period with your corporation. The purpose of this probationary period is to establish realistic attainable goals as well as specific objectives to which you must adhere so that our relationship may continue.

During this probationary period your obligations are not waived and you shall remain subject to all terms and conditions of the Agreement. Although the decision on continuance of your Dealership after the probationary period will be predicated on the objectives of said period, it is expected that you will continue your efforts to achieve the targets specified in the original Agreement. Basic/Four Corporation, of course, will continue to exert our best efforts to provide support to you as specified in the Agreement.

The conditions of the probationary period are as follows:

A. Duration

June 1, 1976 through November 30, 1976 through November 30, 1976

B. Quota

$240,000 for the six-month period

C. Manpower

Effective June 1, 1976, three (3) full-time marketing representatives dedicated to the sale of BASIC/FOUR equipment must be in your employ. Hiring activities should continue during the term of probation to raise the headcount level to four

(4). The headcount must not fall below three (3) dedicated marketing representatives during the term of this probation. It is further anticipated that part-time marketing activity will be continued by M. Frankwicz.

D. **Mass Mailing**

Prior to June 1, 1976, a new "D&B" disc pack along with the "Market Master" disc pack will be ordered from Basic/Four Corporation. Upon receipt of these two items, each of your marketing representatives will mail a minimum of thirty (30) letters per week and follow up on same to generate an adequate prospect base.

E. **Show**

No later than August 31, 1976, a BASIC/FOUR Show must be held in St. Louis. This show must be conducted off-premises. Work on the details of this show should commence immediately as far as contracting with the hotel, moving company, Sorbus, etc. Invitations should be ordered and sent out approximately two weeks in advance of the show to all companies on the "D&B" disc. Follow up by telephone should be instituted at least one week before the show by your "Phone Power" group to insure the maximum participation. Secondary calls should be made within two days of the show to all of those people who indicated uncertainty relative to attendance.

F. **Software**

As orders are booked by St. Louis Information Systems, evidence must be given to Basic/Four Corporation of the ability to install successfully in a timely basis through either additional in-house staffing or contracts with outside software firms.

We are certain that you will agree that through this action of a probationary period we are giving your company every possible opportunity to realize the success which both our companies had anticipated at the time of signing the Dealership Agree-

ment. However, Basic/Four Corporation must retain its rights, and does not by this letter waive such rights, to terminate the Dealership Agreement pursuant to the provisions in Paragraph 6. Therefore, Basic/Four Corporation will terminate this Agreement on November 30, 1976, if the levels of performance specified for the probationary period are not met.

In view of the fact that this letter constitutes an amendment to our Agreement, please execute hereunder for countersignature by Basic/Four Corporation.

Very truly yours,

BASIC FOUR
CORPORATION

/s/ D. D. Kirkwood
Donald D. Kirkwood
Manager, Dealerships

Accepted and agreed to as of the date aforesaid.

BASIC/FOUR CORPORATION	ST. LOUIS INFORMATION SYSTEMS
By /s/ illegible	By /s/ R. D. Bodkin

kp